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No. 94-1862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Arave v. Creech, 113 S. Ct. 1534 (1993) 10
Dyson v. United States, 418 A.2d 127 (D.C. 1980) 4
Elder v. Holloway, 114 S. Ct. 1019 (1994) 3
Godfrey v. Georgia, 446 U.S. 420 (1980) 9
Griffin v. California, 380 U.S. 169 (1965) 2
Jenkins v. United States, 374 A.2d 581 (D.C.), *cert. denied*, 34 U.S. 894 (1977) 4
Lowenfield v. Phelps, 484 U.S. 231 (1988) 9
Maggio v. Williams, 464 U.S. 46 (1983) (per curiam) . . 7, 8
Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) 7
Mickens v. Commonwealth, 442 S.E.2d 678 (Va. 1994) *vacated on other grounds*, 115 S.Ct. 307 (1994) 9
Mickens v. Commonwealth, 457 S.E.2d (Va. 1995) 8
Millard v. Commonwealth, No. 0237-94-1, 1995 Va. App. LEXIS 316 (Va. Ct. App. April 4, 1995) 3
Murray v. State, 781 P.2d 288 (Nev. 1989) 4
People v. Buckey, 378 N.W.2d 432 (Mich. 1985) 5
Ramdass v. Commonwealth, 450 S.E.2d 360 (Va. 1994), *cert. denied*, 115 S. Ct. 1800 (1995) 6
Simmons v. South Carolina, 114 S. Ct. 2187 (1994) 6, 7
State v. Hoxsie, 677 P.2d 620 (N.M. 1984), *overruled on other grounds, Gallegos v. Citizens Ins. Agency*, 779 P.2d 99 (N.M. 1989) 3, 4
State v. Robinson, 384 A.2d 569 (N.J. Super. Ct. App. Div. 1978) 4
State v. Rose, 622 A.2d 78 (Me. 1993) 3, 5
Stringer v. Black, 503 U.S. 222 (1992) 9

TABLE OF AUTHORITIES (Cont'd.)

Page

Turner v. Williams, 35 F.3d 872 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1359 (1995) 10
United States v. Carver, 260 U.S. 482 (1923) 7

STATUTES

Va. Code Ann. § 8.01-384(A) (Michie 1992) 3
Va. Code Ann. § 19-2-264.4(B) (Michie 1990) 8

MISCELLANEOUS AUTHORITIES

W. Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar Ass'n Q. 393 (1960) 7

Brief of Appellant, No. 94-0445, *Williams v. Commonwealth* (Va. 1994) 6

Petition for a Writ of Certiorari, *Cardwell v. Commonwealth of Virginia*, No. 94-7930 (U.S. Feb. 2, 1995) 8

Petition for a Writ of Certiorari, *Swann v. Commonwealth of Virginia*, No. 94-5190 (U.S. July 14, 1994) 8

Petition for a Writ of Certiorari, *Wright v. Commonwealth of Virginia*, No. 94-8271 (U.S. Feb. 2, 1995) 8

R. Stern & E. Gressman, *Supreme Court Practice* (7th ed. 1993) 7

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REPLY BRIEF FOR PETITIONER

As the petition demonstrated, this case raises three important issues warranting review by this Court: (1) whether a prosecutor may comment on a defendant's exercise of his right to confront the witnesses against him; (2) whether a state may prohibit a capital defendant from informing the sentencing jury that he will be ineligible for parole for a significant period of time; and (3) whether Virginia's "vileness" factor, standing alone, is unconstitutionally vague. Respondent's brief in opposition offers no valid reason why this Court should deny review.

A.

At trial, the prosecutor urged the jury to infer from Petitioner's exercise of his Sixth Amendment right to confront the witnesses against him that Petitioner's testimony was fabricated and not credible. As Petitioner explained (Pet. 9-16), the Virginia Supreme Court's decision upholding the prosecutor's conduct deepens a three-way conflict among state courts of final

resort over the constitutionality of such remarks. The decision below is also flatly inconsistent with this Court's opinion in *Griffin v. California*, 380 U.S. 609 (1965). Furthermore, as this issue affects every case in which a criminal defendant considers testifying, it is of indisputable importance.

The Commonwealth's response is noteworthy for what it does not and cannot say. Respondent does not deny that this issue is important and recurring. Nor does it dispute that the decision below conflicts with *Griffin*. Indeed, Respondent fails to make any serious attempt to defend the decision on its merits.[1] Instead, it asserts several specious procedural objections and makes a futile and entirely unpersuasive effort to show that there is no conflict among the lower courts.

1. Respondent first contends (Opp. 3-5) that Petitioner failed to preserve the confrontation issue. The record plainly belies this claim. It demonstrates that Petitioner raised a Sixth Amendment objection during the prosecutor's cross-examination of him, that the trial court overruled that objection after a colloquy with counsel, and that the Virginia Supreme Court addressed the issue on its merits. *See* Pet. App. 15a; 3 Tr. 1212-14. Thus, there is no evidence whatsoever of a procedural default.

Respondent's suggestion that Petitioner should have interrupted the prosecutor's closing argument to renew an objection already rejected by the trial court is meritless. In the first place, the prosecutor's misconduct during cross-examination is reversible error wholly apart from the repetition of that misconduct during summation. Furthermore, a 1992 amendment to the Virginia Code makes clear that "[n]o party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to

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[1] Respondent does assert (Opp. 7 n.1) that, if a jury may infer from the defendant's presence at trial that his testimony is fabricated, then the prosecutor may urge the jury to make that inference. However, as demonstrated in the Petition (Pet. 14), this is precisely the argument that the Court rejected in *Griffin*.

appeal." Va. Code Ann. § 8.01-384(A) (Michie 1992); *see also Millard v. Commonwealth*, No. 0237-94-1, 1995 Va. App. LEXIS 316, at *4 (Va. Ct. App. April 4, 1995) (applying § 8.01-384(A) in a criminal matter). The authorities cited by Respondent (Opp. 4) do not even purport to deal with the impact of this amendment.

2. Respondent contends (Opp. 4) that it would be inappropriate to grant review because Petitioner did not inform the Virginia Supreme Court of the cases from outside of Virginia cited in the petition. This is frivolous. This Court has never suggested that a party seeking certiorari may rely only upon the cases cited below. To the contrary, last Term this Court recognized that review of questions of law is "conducted in light of all relevant precedents, not simply those cited to or discovered by the [lower] court." *Elder v. Holloway*, 114 S. Ct. 1019, 1021 (1994).

3. Respondent also disputes (Opp. 5-6) whether the cases cited in the Petition conflict with the decision below. This argument is meritless as well.

First of all, in an attempt to rehabilitate its procedural default argument, Respondent claims (Opp. at 5) that several cases cited by Petitioner are distinguishable because they involve prosecutorial misconduct during summation rather than during cross-examination. Even apart from the flawed in the premise of this argument, *see supra* p. 2, this claim is groundless. To begin with, there is a square conflict among the lower courts concerning the constitutionality of prosecutorial comment on the exercise of the right of confrontation *during cross-examination*. *Compare State v. Rose*, 622 A.2d 78, 79 (Me. 1993) (holding such comment unconstitutional), *with State v. Hoxsie*, 677 P.2d 620, 622 (N.M. 1984) (finding such comment constitutional), *overruled on other grounds, Gallegos v. Citizens Ins. Agency*, 779 P.2d 99 (N.M. 1989). Moreover, those decisions explicitly recognize that the timing of the prosecutor's comments makes no difference. In *Rose*, 622 A.2d at 79, the Supreme Judicial Court of Maine instructed prosecutors in that State to refrain from making such comments during both cross-examination and summation, and in

Hoxsie, 677 P.2d at 622, the New Mexico Supreme Court resolved a constitutional challenge to a comment *during cross-examination* by relying upon *State v. Robinson*, 384 A.2d 569 (N.J. Super. Ct. App. Div. 1978), a case involving a comment during summation. Furthermore, Respondent fails even to suggest how a meaningful distinction may be drawn between prosecutorial comments made during cross-examination and those made during summation.

Respondent's other attempts to distinguish the cases cited in the petition (Opp. 5-7) are equally meritless. For the most part, Respondent simply mischaracterizes the pertinent decisions. For example, Respondent claims (Opp. 6) that "[a]t no time in [*Murray v. State*, 781 P.2d 288 (Nev. 1989),] did the prosecutor question the defendant about or comment upon the fact that he had heard all of the witnesses testify before he took the stand." However, as Petitioner explained (Pet. 10-11), the prosecutor in *Murray* plainly stated that "Mr. Murray was able to sit here and listen to everyone testify." *Murray*, 781 P.2d at 290.[2] Equally unfounded is Respondent's claim (Opp. 6) that *Dyson v. United States*, 418 A.2d 127 (D.C. 1980), involved an appellate court's exercise of its supervisory powers. Far from invoking such powers, *Dyson* explicitly relied upon *Jenkins v. United States*, 374 A.2d 581 (D.C.), *cert. denied*, 434 U.S. 894 (1977), which held that prosecutorial comment on a defendant's exercise of the right of confrontation violates the Sixth Amendment (*see* Pet. 10).

Respondent also argues (Opp. 5-6) that the decisions in *Rose* and *Jenkins* cannot support a conflict because the judgments in

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[2] Respondent also contends (Opp. 6) that *Murray* is based "upon a violation of a defendant's Fifth Amendment right to remain silent." Be that as it may, it is clear that *Murray* conflicts with the decision below: the Nevada Supreme Court held it unconstitutional for a prosecutor to urge the jury to draw an adverse inference because the defendant could "listen to the testimony of other witnesses" and "fabricate a story consistent with the other testimony before he had to testify." 781 P.2d at 291.

those cases were not reversed. This argument places form over substance. The court in *Jenkins* reached the question of harmless error only because it found a substantive error — specifically, that the prosecutor's comment on the defendant's exercise of the right of confrontation was unconstitutional. Moreover, as *Dyson* demon-strates, *Jenkins* is binding precedent in the District of Columbia. Similarly, while in *Rose* the Supreme Judicial Court of Maine could have avoided the Sixth Amendment issue on procedural grounds, it instead instructed prosecutors in that State in no uncertain terms to "refrain from asking improper questions and making inappropriate comments which are strategically designed to cast a defendant's most basic constitutional rights in a negative light." 622 A.2d at 79. As a consequence, it is clear that the decision below conflicts with decisions of the highest courts in Nevada, the District of Columbia, and Maine.

Finally, there can be no doubt that the decision below conflicts with the decision of the Michigan Supreme Court in *People v. Buckey*, 378 N.W.2d 432 (Mich. 1985). As Petitioner demonstrated (Pet. 11-12), in *Buckey* the Michigan Supreme Court permitted comment on a defendant's presence at trial only where there is evidence of fabrication. Unable to reconcile the decision below with the approach taken in *Buckey*, Respondent simply ignores it. Thus, despite Respondent's contentions to the contrary, it is clear that the decision below conflicts with the decisions of at least four other state courts of final resort.

4. Respondent's suggestion (Opp. 7-8) that this Court should deny review because Petitioner admitted committing a capital murder is disingenuous. The prosecutor began his cross-examination of Petitioner by highlighting the fact that Petitioner had sat through the trial and heard all of the evidence (*see* Pet. 6). Indeed, the prosecutor made Petitioner's presence at trial the centerpiece of his cross-examination and he returned to this point toward the end of cross-examination as well as in his summation because that point was crucial to his case. Respondent cannot now suggest that these statements were immaterial and irrelevant.

As the petition demonstrated (Pet. 4-7, 15), the prosecutor's repeated attacks on Petitioner's credibility were purposeful and highly prejudicial. They were designed to ensure that the jury believed the testimony of Jeffrey Alan Cruse, Petitioner's co-assailant. Although Cruse also admitted committing a capital murder, he was spared the death penalty because he contended Petitioner bore primary responsibility for the crimes committed against Morris and Mary Keller. Absent the improper comments of the prosecutor, the jury may well have believed that Cruse, not Petitioner, bore primary responsibility for those crimes and sentenced Petitioner to life imprisonment. The possibility that the jury may have sentenced Petitioner to death as a result of the prosecutor's misconduct provides ample justification for this Court's review.

B.

The second question presented by this case is whether a state may prohibit a capital defendant from informing the jury that he will be ineligible for parole for a substantial period of time. As the petition demonstrates (Pet. 16-22), this important and recurring question was left open in *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994), and in the year since that decision conflict and confusion have already arisen among the lower courts. In addition, the lower courts are split over whether the Eighth Amendment requires admission of such evidence.

1. Respondent's first argument (Opp. 8-10) is that this issue does not present a federal question. This is frivolous. Petitioner plainly based his request to inform the jury of his parole eligibility upon the "Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States," 1 Tr. 48, and he cited federal, not state, cases to the Virginia Supreme Court. *See* Brief of Appellant, at 25-27, *Williams v. Commonwealth*, No. 94-0445 (Va. 1994). Furthermore, the Virginia Supreme Court rejected Petitioner's claim based not on state law, but on a decision issued that same day interpreting *Simmons* to apply only to cases of total parole ineligibility. *See* Pet. App. 10a (relying upon *Ramdass v.*

Commonwealth, 450 S.E.2d 360, 361 (Va. 1994), *cert. denied*, 115 S. Ct. 1800 (1995)).

2. Respondent's suggestion (Opp. 9-10) that *Simmons* decided the issues presented here is meritless. In the first place, as Respondent concedes (Opp. 9), *Simmons* did not consider the applicability of the Eighth Amendment. *See* 114 S.Ct. at 2193 n.4. Furthermore, the lower courts would not be in conflict over the application of the Due Process Clause to partial parole eligibility if *Simmons* had resolved this issue. Contrary to Respondent's suggestion, the plurality and concurring opinions in *Simmons* did not limit the application of the Clause to instances of parole ineligibility; they simply limited their holdings to the facts before the Court. Moreover, Justice Scalia took the position that *Simmons* could *not* be limited to parole eligibility. In his view, the decision was "at least as sweeping as this: that the Due Process Clause overrides state law limiting the admissibility of information concerning parole *whenever* the prosecution argues future dangerousness." *Id.* at 2203 (Scalia, J., dissenting) (emphasis in original).

3. Respondent also contends (Opp. 11) that the parole eligibility issue is not worthy of review because this Court has denied certiorari in three prior cases. It is well-settled, however, that "[a] variety of considerations underlie denials of the writ," *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-18 (1950), and that therefore "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case," *United States v. Carver*, 260 U.S. 482, 490 (1923). This Court, as Justice Brennan has noted, may deny certiorari in a particular case and then "take the very next case raising the same question." R. Stern & E. Gressman, *Supreme Court Practice* 240 n.56 (7th ed. 1993) (quoting W. Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar Ass'n Q. 393, 402-03 (1960)).[3]

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[3] The case cited by Respondent (Opp. 11), *Maggio v. Williams*, 464 U.S. 46 (1983) (per curiam), does not suggest otherwise. *Maggio* involved a stay of execution, not a petition for certiorari, and the Court

Furthermore, this petition presents a far more compelling case than the petitions cited by Respondent. Those petitions did not inform the Court that there was any conflict among the lower courts. *See* Petition for a Writ of Certiorari, at 10-22, *Cardwell v. Commonwealth of Virginia*, No. 94-7930 (U.S. Feb. 2, 1995); Petition for a Writ of Certiorari, at 15-19, *Wright v. Commonwealth of Virginia*, No. 94-8271 (U.S. Feb. 2, 1995); Petition for a Writ of Certiorari, at 8-13, *Swann v. Commonwealth of Virginia*, No. 94-5190 (U.S. July 14, 1994). The instant petition clearly demonstrates (Pet. 16-22) that there is such a conflict. As a consequence, unlike the petitions cited by Respondent, this petition presents a powerful reason to review the issue of partial parole eligibility.

4. Finally, Respondent does not and cannot claim that the trial court's refusal to inform the jury of Petitioner's parole eligibility was harmless error. Under Virginia's capital sentencing scheme, the jury may consider any evidence before it in determining whether to recommend the death penalty. *See* Va. Code Ann. § 19-2-264.4(B) (Michie 1990), Pet. App. 31a. By refusing to inform the jury of Petitioner's parole eligibility, the trial court deprived the jury of probative, mitigating evidence, thereby necessitating reversal under Virginia law. *See Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995).

C.

The final issue presented in the petition is whether Virginia's vileness aggravating factor, standing alone, is unconstitutionally vague. As the petition demonstrated (Pet. 25-28), the decision below is inconsistent with decisions in at least 17 other states and

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considered prior denials of certiorari because the standard for granting such a stay is whether there is "a reasonable probability that four members of the Court would consider the [issues in the case] sufficiently meritorious for the grant of certiorari." 464 U.S. at 48 (quotation omitted). This Court has never extended *Maggio* beyond this narrow context.

with this Court's decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980). Respondent does not and cannot dispute these points.

1. Respondent does once again contend (Opp. 12) that there is no federal question. Here again, however, it is clear that Petitioner challenged the vileness instructions on federal grounds, *see* 1 Tr. 79-91, and that the Virginia Supreme Court rejected that challenge based upon its prior rejection of a claim of unconstitutional vagueness. Pet. App. 5a (citing *Mickens v. Commonwealth*, 442 S.E.2d 678, 684 (Va.), *vacated on other grounds*, 115 S.Ct. 307 (1994)). Moreover, Respondent's substantive argument — that after *Lowenfield v. Phelps*, 484 U.S. 231 (1988), it does not matter whether Virginia's aggravating factors are vaguely worded — has been expressly rejected by this Court. *See Stringer v. Black*, 503 U.S. 222, 235-36 (1992) (finding *Lowenfield*'s relevance to *Godfrey* and the issue of vagueness "slight at best").

2. Respondent also contends (Opp. 14) that the Virginia Supreme Court applied a limiting construction. In support of this contention, it points to the statement in the decision below that the evidence in the record "justifies the jury's finding of the 'vileness' of the Keller murders and of Williams's 'future dangerousness.'" Pet. App. 21a. There is, however, no indication in this statement, which occurred in the course of the Virginia Supreme Court's proportionality review, that the Virginia Supreme Court actually applied any limiting construction. Nor is there any indication in the Virginia Code or in Respondent's brief that the Virginia Supreme Court, when faced with an improper jury instruction, would find facts itself rather than vacate and remand for further fact finding.

3. Finally, Respondent argues (Opp. 13-14 & n.6) that the decision below was correct on the merits. It contends that *Godfrey* was not based upon the statutory language but upon the particular facts of that case. However, in a series of cases ignored by Respondent (*see* Pet. 27-28), this Court has consistently construed *Godfrey* to be based upon the statutory language and specifically found that it has broad application. *See,*

e.g., *Arave v. Creech*, 113 S. Ct. 1534, 1541 (1993) (noting that this Court has found "pejorative adjectives such as . . . 'outrageously or wantonly vile, horrible and inhuman'" unconstitutionally vague). Equally baseless is Respondent's contention (Opp. 13-14) that the Fourth Circuit has consistently rejected challenges to Virginia's vileness factor. Although the Fourth Circuit has upheld the factor where a limiting construction was applied, it has recognized Virginia's vileness factor as "facially vague." *Turner v. Williams*, 35 F.3d 872, 880 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1359 (1995).[4]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[4] Respondent also errs in arguing (Opp. 13) that the vileness issue does not warrant review because the jury found future dangerousness. Petitioner is seeking review of the jury's finding of future dangerousness; if he prevails, the courts below will need guidance on how to apply the vileness factor constitutionally.